Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JOHNSON, JR.
for the use of ERNEST T. ROSSIELLO, Attorney,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ERNEST T. ROSSIELLO, Esq.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 346-8920
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF AUTHORITIES

Cases PAGE

Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975) 6

Bloomer v. Liberty Mutual, 100 S.Ct. 925 (1980), 48 LW 4211 4

Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525 (1956) 2, 3

Fontana v. Pennsylvania R. Co., 106 F.Supp. 461 (S.D.N.Y. 1952), aff'd mem. on opinion below sub nom. Fontana v. Grace Line, Inc., 205 F.2d 151 (CA 2), cert. denied, 346 U.S. 886 (1953) 6

Nacirema v. Oosting, 456 F.2d 956 (4th Cir. 1972) 4

Rodriguez v. Compass Shipping Co., Ltd. (Docket No. 79-1977) (October 6, 1980) 1, 2, 3, 6, 7

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) .. 6

Valentino v. Rickners Rhederei, G.m.B.H., 552 F.2d 466 (2 Cir. 1977) 3

Other Authorities

33 U.S.C. § 907 3

33 U.S.C. § 928 4

33 U.S.C. § 928(b) 5

33 U.S.C. § 928(d) 5

33 U.S.C. § 933(a) 2, 3, 4, 5, 7

33 U.S.C. § 933(b) 1, 2, 6, 7

33 U.S.C. § 933(e) 2

105 Cong. Rec. 12674 (July 6, 1959) 4

105 Cong. Rec. 15343 (August 10, 1959) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JOHNSON, JR.
for the use of ERNEST T. ROSSIELLO, Attorney,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Certiorari has recently been granted (October 6, 1980) by the Supreme Court in *Rodriguez v. Compass Shipping Co., Ltd.* (Docket No. 79-1977), also involving §933 of the Longshoremen's and Harbor Workers' Compensation Act. Certiorari was granted there to review the equitable considerations under 33 U.S.C. §933(b) in allowing a longshoreman to maintain his own third party action even though more than six months had elapsed from receipt of a compensation award and

the express language of the Act [§933(b)] had already appeared to assign the right of action to the stevedore. Incidental to a decision on the merits of *Rodriguez* will be acceptance or rejection by the Supreme Court of the Second Circuit's decision to limit *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956) to the facts of the case where the stevedore and vessel owner were insured by the same carrier.

Directly related to the review granted in *Rodriguez* is the nature of the conflict of interest between longshoreman and stevedore in bringing a third party action and the applicable purpose of the Longshoremen's and Harbor Workers' Compensation Act in allowing a stevedore to recoup, through a third party recovery, its losses occasioned by payment of compensation. [Questions (2) and (3) in *Rodriguez'* petition for a writ of certiorari].

Implicitly necessary to a full and fair consideration of allowing a longshoreman to sue in his own behalf, even after 6 months from a compensation award, is a discussion of his right to choice of counsel; a discussion of the conflict of interest, *vel non*, between the longshoreman and his employer in bringing the third party action against the vessel owner; what constitutes an "assignment" under §933 of the Longshoremen's and Harbor Workers' Compensation Act; and, a discussion of the fact that distribution of the third party recovery fund under §933(e) will be no different, as far as the stevedore is concerned, whether the action is brought by the longshoreman himself pursuant to §933(a), or by the stevedore by virtue of an assignment under §933(b). A treatment of the balancing of the equities over which person is better suited to bring a third party action and who is more apt to benefit the employee, for whom the

LHWCA was created, is something which the Supreme Court is surely to deal with in *Rodriguez.*[1] For, it is common knowledge, the stevedore does not bring third party actions for fear of antagonizing its customers, the vessel owners. See *Rodriguez,* and *Valentino v. Rickners Rhederi,* 552 F.2d 429. Strong arguments can be made that the longshoreman will pursue the action more vigorously than his employer.

In *Czaplicki,* certiorari was granted because of the importance of the question presented in the administration of the LHWCA. [*Czaplicki,* 351 U.S. at 528]. Likewise, in the case at bar, also involved is a question of great importance in administration of the Act. Certiorari should be granted here because of the equitable considerations involved in the tripartite of stevedore-longshoreman-attorney over who should rightly bear the cost of litigation where a benefit is bestowed upon the stevedore. Since this is a matter of great importance to the consistent and uniform administration of the LHWCA, and the decision of the Supreme Court here will affect thousands of longshoremen, their lawyers, stevedores and insurance carriers, the petition for a writ of certiorari should be granted.

Congress made a deliberate choice in the amendments of 1972 to allow the longshoreman the right to bring his own action under §933(a), *Valentino, supra.* With that

---

[1] An injured longshoreman has the right under the Act to choose his own doctor for medical treatment [33 U.S.C. §907]. A corresponding right to choose a lawyer has also been sanctioned by Congress in §933(a), yet, the panel of the Seventh Circuit feels the stevedore is the one which should bring suit [See Pet., p. 11a]. This will undoubtedly be something which the Supreme Court will treat and discuss in *Rodriguez* when it hears the case on its merits.

came the corresponding duty to pay his own attorney's fees. Out of the net proceeds[2] of the settlement or judgment, the stevedore was entitled to equitable reimbursement for its compensation payments *before* the longshoreman could recover anything from the third party actions, for, not to reimburse the stevedore first would assure the longshoreman of a double recovery and would guarantee him a supplement from the third party action above his statutory benefits and place him in a position better than the average civil litigant.

A panel of the Seventh Circuit, in the case sought to be reviewed, has made many pronouncements which deviate very far from the accepted standards of application of the Longshoremen's and Harbor Workers' Compensation Act [see Pet., pp. 9a-11a] and has come to a most inequitable and incongruous conclusion. This conclusion gives both the stevedore and the longshoreman a windfall at the sole expense of the attorney who exerted approximately 300 hours of time to create the settlement. In addition, all of the reasons in support of its decision are clearly erroneous, namely,

(1) The panel equated attorney's fees under §928 with attorney's fees under §933(a). These sections are clearly mutually exclusive and involve two separate causes of action.

---

[2] "Net proceeds" has been uniformly construed to mean the balance of the third party fund remaining after attorney fees and expenses. See *Bloomer v. Liberty Mutual*, 100 S. Ct. 925 (1980), 48 LW 4211 at 4213 (Docket No. 78-1418), fn. 6, citing 105 Cong. Rec. 12674 (July 6, 1959) and 105 Cong. Rec. 15343 (August 10, 1959); and 48 LW at 4214, 4215 fn. 13. See, too, *Nacirema v. Oosting*, 456 F.2d 956 (4th Cir. 1972). The panel of the Seventh Circuit apparently disregarded this construction, although informed of it in the record below [Appellant's brief, p. 11].

(2) The panel erroneously believed that the separate award of $3,500.00 in attorney's fees under §928(b) of the Act, which is intended to be a penalty against the employer for underpaying compensation, and which in no manner affects or diminishes the longshoreman's award [see §928(d)] was "payment in full [to Rossiello] from the stevedore" [Pet. p. 10a] for his efforts in generating the third party settlement. This is blatant error, for, generation of the $64,000.00 settlement with the vessel had nothing whatsoever to do with the compensation case against the stevedore, as they are two separate and distinct funds and causes of action.

(3) The panel erroneously believed that allowing the plaintiff's lawyer to take his fee on the *full* $64,000.00 settlement would allow recovery exceeding the statutorily prescribed fees—when §933(a) allows the longshoreman to retain and choose his own lawyer, and this includes setting the lawyer's compensation.[3]

(4) It would contravene "Congress' statutory directive that the compensation tribunal determine the amount of the fee." [Pet., p. 10a]. This is plain error because nowhere in the Act is there any provision which directs the United States Department of Labor to regulate the attorney's fees in third party actions. Congress could

---

[3] The panel erroneously believes Johnson would have been better off if the stevedore had sued for him. Petitioner respectfully disagrees with this view. Most plaintiffs' personal injury litigation is undertaken on a contingent fee basis. Even if the stevedore's lawyers had taken the case on a 33⅓% contingent fee basis there still would have been nothing left for Johnson, as the attorney's lien for fees and expenses would have reduced the recovery to less than the amount of compensation paid, and there would have been nothing upon which to predicate "80% of the balance to Johnson" as the Seventh Circuit suggests. [Pet., p. 10a].

have provided a limit on the amount of attorney's fees in negligence actions, such as in Federal Tort Claims Act cases, but it chose not to.

These are some of the things which the Supreme Court will inevitably face in deciding *Rodriguez*, and how they bear on the right of an injured longshoreman, who has already received an award of compensation and had his attorneys' fees paid, but who has decided, after the time stated in §933(b), to choose his own lawyer and bring a third party action. The stevedore has no statutory "lien", but only a judicially created right to reimbursement, *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-980 (5th Cir. 1975) It appears the longshoreman is in a position to enforce his claim for negligence more effectively himself —as he does not run the risk of alienating a customer as would the stevedore who sues the vessel owner.

Finally, it has been a long recognized rule of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts from that fund. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). Judge Weinfeld in *Fontana* reiterated "A further compelling consideration which may not be ignored is that the entire act negates any theory that an injured employee is entitled to both compensation from his employer and damages from third parties . . . [the employee] is given the choice of election but he may have both compensation from his employer and damages from third parties." *Fontana*, 106 F.Supp. at p. 463.

Here, a panel of the Seventh Circuit has come to a most inequitable result by allowing the longshoreman a double recovery, and ordering the stevedore reimbursed in full by giving its right to reimbursement priority over the attorney's lien for fees and expenses. The

distribution of the third party fund should be the same under §933(a) as it is under §933(b) as the Supreme Court held in *Bloomer* last term.

CONCLUSION

The petition for a writ of certiorari should be granted and this case heard on its merits along with *Rodriguez v. Compass Shipping Company, Ltd.*, Docket No. 79-1977 as a related case.

Respectfully submitted,

ERNEST T. ROSSIELLO, Esq.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 346-8920
Attorney for Petitioner